# SCHOOL-SPONSORED SPEECH AND THE SURPRISING CASE FOR VIEWPOINT-BASED REGULATIONS

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## I. INTRODUCTION

Regulation of speech on the basis of the speech's message or viewpoint is especially disfavored in the law.[1] The courts have generally concluded that restricting speech based on anyone's disapproval of the viewpoint or message of the speech "poses the greatest danger to liberty of expression."[2] Thus, it has been said that "the most intense constitutional hostility is reserved for measures that discriminate on the basis of viewpoint . . .."[3]

This Article takes no issue with this principle as a general rule. The point of the Article, however, is to illustrate the logic of what should be a crucial exception to this general rule. This exception addresses regulation based on message or viewpoint of what is commonly referred to as school-sponsored speech. School-sponsored speech is speech by anyone that at least reasonably appears to bear the approval or endorsement of public school authorities.[4] Such school–sponsored speech, as in many school newspapers, websites, displays, yearbooks, assemblies, or events, is common.

While precise counts are difficult, probably a majority of the courts[5] and commentators[6] who have addressed this important issue have wished to apply something like the standard–and very demanding–strict scrutiny test to these

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1. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) ("restrictions based on viewpoint are . . . particularly pernicious"); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 685 (1994) (Ginsburg, J., concurring in part and dissenting in part); Rosenberger v. Rector & Bd. of Visitors, 515 U.S. 819, 829 (1995) ("[v]iewpoint discrimination is . . . an egregious form of content discrimination"). *But cf.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 n.11 (2d Cir. 2005) (discussing the possibility of a school's viewpoint–based regulation prevailing even under strict scrutiny).
2. Kent Greenawalt, VIEWPOINTS FROM OLYMPUS, 96 COLUM. L.REV. 697, 698. *See also id.* (referring to "the Court's fundamental principle that, across a wide range of subject matters, viewpoint discrimination is especially objectionable").
3. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 609–10 (1986).
4. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).
5. *See infra* Section III.
6. *See id.*

viewpoint-based regulations of public school-sponsored speech.[7] While this approach is familiar and understandable, it is nonetheless a mistake, for reasons discussed below.[8] The central problem, in its most concise terms, is that strict judicial scrutiny of a school's viewpoint-based regulation of speech that at least appears to be approved by the school administration typically imposes unnecessary costs in basic social, educational, and cultural values, including constitutional and indeed even free speech values.

To prepare this argument, Section II below presents the crucial and most authoritative case of *Hazelwood School District v. Kuhlmeier*.[9] *Hazelwood* is widely thought to raise, without resolving, the question of the strict scrutiny, if not outright, prohibition[10] of viewpoint-based restrictions on school-sponsored speech. School-sponsored, or apparently school-approved, speech is undertaken by a wide variety of factors, including students, classroom teachers, other school employees, and even by outsiders such as school visitors.[11] For the sake of simplicity, we will focus first, as *Hazelwood* itself does, on the speech of students who under particular circumstances, such as in the case of newspaper editors, might be thought to speak with the approval of the school.[12] We will later expand our focus and think as well of teacher speech that is arguably sponsored by the school.[13]

The argument proceeds, in Section III, through complex but unavoidable issues of what is known as public forum doctrine, by itself and also in combination with the original distinction between viewpoint-based and viewpoint-neutral restrictions on speech. We will then begin to see some of the surprising costs of strict scrutiny of viewpoint-based regulations and the surprising benefits of a less stringent constitutional test.

Throughout, we will seek to distinguish school-sponsored speech from the separate category of speech of and by school authorities, or official school speech.[14] The distinction is important in the current law, but is often quite difficult to draw in practice. We will also seek to distinguish school-sponsored

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7. *See id.*; R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (for extended discussion in this connection).
8. *See infra* Sections III-V.
9. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
10. *See infra*, note 102 and accompanying text.
11. For a compilation and analysis of the use of the *Hazelwood* test, in place of other arguably appropriate tests, to adjudicate cases involving the discipline of teachers for classroom speech, see Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 12 (2001) ("Hazelwood's principles for limiting student expression cannot be imported into the realm of teacher expression without excessively curtailing teachers' First Amendment rights"); *Id.* at 16 ("[t]he net effect of Hazelwood as applied is the subtle infantilization of teachers").
12. As in *Hazelwood* itself, 484 U.S. at 271.
13. *See* Daly, *supra* note 11.
14. *See infra* notes 80, 129 and accompanying text.

speech from speech by independent individual students or by independent groups of students.[15] This is another distinction that is important to the current law, but difficult to draw. Our focus will thus ideally be on school-sponsored speech, rather than on either official school speech or on independent speech.

Section IV places the arguments developed to that point into our realistic contemporary cultural and educational context. In that context, it becomes clearer why a less demanding judicial test than strict scrutiny for viewpoint-based regulations of school-sponsored speech promotes basic social, educational, and cultural values, along with constitutional values including freedom of speech.[16]

Briefly put, a contemporary public school's viewpoint-based restrictions on what others say with at least the apparent endorsement of the school are realistically more likely to be well-justified than not. Given the basic values, including free speech-related values, typically promoted routinely by most contemporary public schools, we should be open to generally promoting those values through viewpoint-based restrictions of speech that appear to bear the school's approval.

There may admittedly be instances in which a contemporary public school seeks to repress a clearly progressive statement made with its apparent approval, but such instances should not fundamentally drive the relevant general free speech rules. We should remember that speech by various parties apparently in the name of the school can certainly send distracting or generally harmful, community-damaging messages as well. We should also remember that students and others remain relatively free to disseminate messages as long as they do so clearly independently of the public school.

Section V, the Conclusion, briefly summarizes some of the most important themes developed above. As well, Section V explores possible limits to our argument against strict scrutiny for viewpoint-based regulation by the school of apparently school-sponsored speech. Specifically, we briefly consider the applicability of such a rule in the context of a major public university restricting the speech of field-specialist professional faculty. As it turns out, such cases can indeed raise important free speech issues. But they will rarely qualify as *Hazelwood*-type "sponsorship" cases. Either the school or the speaker in the university context can more easily disassociate itself from the other party's sentiments, or can effectively disclaim any school-sponsorship of the content of the speech in question. Such a disassociation, on the part of either or both parties, can take place in ways that are public, clear

15. As, classically, in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

16. *See infra* Sections IV and V.

and unequivocal, conspicuous, and convincing to the relatively sophisticated university audience most directly concerned.

Thus, the *Hazelwood* test, as interpreted here to allow for appropriate viewpoint-based regulation of arguably school-sponsored speech, retains both broad applicability and surprising appeal on the merits.

## II. *HAZELWOOD* AS SETTING THE STAGE FOR THE CURRENT DEBATE ON VIEWPOINT-BASED REGULATION

*Hazelwood School District v. Kuhlmeier*, involved a 6–3 decision,[17] with the majority opinion being authored by Justice White,[18] and a dissenting opinion for three relatively liberal justices[19] by Justice Drennan.[20] As formulated by Justice White, the case focused on "the extent to which educators may exercise editorial control over the contents of a [public] high school newspaper produced as part of the school's journalism curriculum."[21]

The newspaper in question was written and edited under the auspices of the high school's[22] elective Journalism II class.[23] Copies were distributed to students and school personnel and to "members of the community."[24] Of the newspaper's annual printing expense, approximately one fourth was defrayed by newspaper sales,[25] and three fourths by the Hazelwood Board of Education.[26] The practice was apparently for the page proofs of each newspaper issue to be submitted to the school principal for pre-publication review.[27]

In *Hazelwood*, the principal had deleted two pages on various grounds from an otherwise six page newspaper edition. One deleted story involved the use of false names to preserve the anonymity of three pregnant students at the school; with the principal fearing that the pregnant students might nonetheless be identifiable from the story.[28] The principal also concluded that some references in the story to sex and pregnancy were inappropriate for some of the

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17. Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260, 261 (1988).
18. *Id.* at 262.
19. Justices Brennan, Marshall, and Blackmun.
20. *Hazelwood*, 484 U.S. at 277 (Brennan, J., dissenting) (joined by Justices Marshall and Blackmun).
21. *Id.* at 262.
22. *See id.*
23. *See id.*
24. *Id.*
25. *See id.*
26. *See id.* at 262–63.
27. *See id.* at 263.
28. *See id.*

youngest high school students.[29] As well, and also with respect to a separate story, the principal was concerned about matters of privacy and journalistic fairness. The principal was apparently under the impression that in a story about the impact of divorce, a student making statements arguably critical of her father was identified by name.[30] The student's parents had apparently not been given an opportunity to respond to or to consent to publication of the student's comments.[31]

The principal evidently believed that the stories could not be appropriately edited if they were to be published before the end of the school year, and that the only alternatives to running the unedited six page edition were to publish no edition at all, or to delete the two pages containing the stories in question, resulting in a four page newspaper. With the concurrence of his superiors, the principal opted for the latter, four page edition alternative,[32] prompting the free speech claim in question.

The Supreme Court began its analysis in *Hazelwood* with the familiar, if not particularly illuminating, observation that "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[33] The Court then predictably cautioned that those rights "'are not automatically coextensive with the rights of adults in other settings'"[34] and "must be applied in light of the special characteristics of the school environment."[35] Thus, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[36] In a prior case, vulgarly sexually explicit speech by a student addressing an official school assembly could be sanctioned by a school in order to "dissociate itself"[37] from the speech. This form of disassociation was permitted as a clarifying demonstration to observers "that such vulgarity is 'wholly inconsistent with the fundamental values of public school education.'"[38]

The Court in *Hazelwood* then undertook an analysis of the school newspaper in question under what is known as 'public forum' doctrine.[39] The

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29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* at 264.
33. *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
34. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
35. *Id.* (quoting *Tinker*, 393 U.S. at 506).
36. *Id.* (quoting *Fraser*, 478 U.S. at 685).
37. *Id.*
38. *Id.* at 267 (quoting Fraser, 478 U.S. at 685–86).
39. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985); U.S. v. Kokinda, 497 U.S. 720 (1990); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

term 'public forum' itself is sometimes used equivocally. A public high school's curricular newspaper, consisting in some measure of articles and editorial contributions, if not letters to the editor from selected students, is clearly a public forum of one type or another, as the term is broadly used.[40] The same newspaper, however, can also be classified as not being a public forum in a narrower and more restrictive sense of the term.[41]

The latter, narrower sense, in which the curricular newspaper was not a public forum, starts by distinguishing classic public fora such as public parks. The Court in *Hazelwood* thus noted the availability for speech of classic quintessential[42] or traditional[43] public fora such as public parks, public streets, and public sidewalks.[44] Speech in these classic fora can be regulated based on the content of the speech at issue only if the regulation is narrowly tailored to serve a genuinely compelling government interest.[45] Speech in classic fora can also be regulated on content-neutral grounds if the regulation leaves open ample alternative channels of communication and is reasonably well tailored to serve a significant or substantial government interest.[46]

The *Hazelwood* Court then readily distinguished between public parks, streets, and sidewalks on the one hand and a curricular school newspaper on the other.[47] The newspaper in question certainly had not served, "time out of mind,"[48] as a forum for discussion as comprehensive in subject matter and point of view as we might expect of a public park. Nor had the school administration intentionally sought even recently to have the newspaper occupy any such role.[49]

Complications began to arise, though, with the Court's recognition that the school could also have created a public forum in the narrow sense by allowing apparently "indiscriminate use"[50] of the newspaper not by the public in general, but even by a narrow segment of the public, such as a "class" of

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40. The Court literally conceded as much in characterizing the newspaper as a "forum" reserved for its largely curricular or more broadly pedagogical purposes. *Hazelwood*, 484 U.S. at 270.
41. *See id.* at 267–70.
42. *See, e.g.*, Hill v. Colo., 530 U.S. 703, 715 (2000); Burson v. Freeman, 504 U.S. 191, 196–97 (1992); *Perry*, 460 U.S. at 45.
43. *See, e.g., Forbes*, 523 U.S. at 677; Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992); Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).
44. *Hazelwood*, 484 U.S. at 267. For further discussion, *see, e.g., Ward*, 491 U.S. at 796–97; Frisby v. Schultz, 487 U.S. 474, 481 (1988); *Perry*, 460 U.S. at 45.
45. See the sources cited *supra* note 44.
46. *See id.*
47. *See Hazelwood*, 484 U.S. at 267.
48. *Id.*
49. *Id.*
50. *Id.*

students.[51] So a public forum in the narrow sense could be created and reserved for members of a high school journalism class producing a newspaper under the right circumstances.

In finding no public forum, the Court in *Hazelwood* appeared to rely, then, not on the narrowness of the population allowed access to the newspaper, but on the lack of authorization by the school for "indiscriminate use"[52] of the newspaper for speech purposes by anyone. Allowing only "limited discourse"[53] in a communicative medium such as a school newspaper does not convert the medium into a public forum in the narrow sense.[54]

One potential problem, though, is that public fora in the narrow sense can actually be compatible with stringent restrictions on what is to be said, as well as on who can speak. It was well-established as of the time of *Hazelwood* that "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."[55] A forum such as a school newspaper could in principle, therefore, exclude most interested potential speakers and focus exclusively on one or a few subjects, to the exclusion of all other subjects, and still count as a public forum in the narrow sense.[56]

A narrow permissible range of subjects or speakers is not thought to necessarily involve restricting speech on the basis of viewpoint. While it is commonly said that viewpoint-based restrictions are either prohibited or at least subjected to strict scrutiny in any public forum,[57] it is also apparent that governments may somehow define the scope, limits, and purposes of some

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51. *See id.*
52. *Id.*
53. *Id.*
54. *See id.*
55. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983); *See also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985) (discussing the government interest "in limiting the use of its property to its intended purpose"); Ark. Educ. Television Com'n v. Forbes, 523 U.S. 666, 677 (1998); (strict scrutiny applied where "the government excludes a speaker who falls within the class to which a designated public forum is made generally available"); Rosenberger v. Rector & Bd. of Visitors, 515 U.S. 819, 829 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).
56. The Court has referred to the public forum classification as indicating general rather than selective access for speakers. *See Forbes*, 523 U.S. at 679–80. But this terminology by itself is clearly an oversimplification. The "general" availability need be only to a "certain class" of speakers, whereas non-public forum status can attach to a forum used by a "particular class" of speakers who must obtain permission as individuals to use the forum, presumably on either stringent or else on lax, inclusive grounds. *See id.*
57. *See, e.g., Perry*, 460 U.S. at 46; *Good News Club*, 533 U.S. at 106–07; *Cornelius*, 473 U.S. at 806; United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion).

public fora.[58] Exclusion from the public forum can then be said to be not on the basis of viewpoint, but on the basis that the speaker or subject is simply not within the designated scope of the forum or not of a character relevantly similar to those within the scope of the forum.[59]

In any event, the *Hazelwood* Court concluded that the curricular paper in question did not qualify as a public forum in the narrow sense of the term.[60] Where a newspaper has been reserved not for indiscriminate open access, but "for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[61]

At least in this passage the *Hazelwood* Court suggests, with whatever degree of conscious consideration, that speech regulations in non-public fora must be reasonable,[62] with no explicit, additional requirement that such regulation must also be viewpoint neutral.[63] The primary authority the Court cites, however, the *Perry* case, clearly does impose a viewpoint-neutrality requirement for regulation of speech in non-public fora.[64] We, of course, must not read too much into this single passage or instance of omission.

But we should also notice that when the *Hazelwood* Court reiterates its non-public forum finding, it again omits the usual viewpoint-neutrality requirement,[65] even while citing language in *Perry* that does impose such a viewpoint-neutrality requirement.[66] This omission inevitably forms some portion of the backdrop against which to assess the Court's literal omission of

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58. *See, e.g., Kokinda*, 497 U.S. at 730 (plurality opinion); *Cornelius*, 473 U.S. at 806; ACLU v. Mote, 423 F.3d 438, 444–45 (4th Cir. 2005).

59. *See, e.g., Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829; Eichenlaub v. Twp. of Ind., 385 F.3d 274, 280–81 (3d Cir. 2004); *Mote*, 423 F.3d at 444–45.

60. *See* Hazelwood Sch. District v. Kulmeier, 484 U.S. 260, 267 (1988). For discussion by Judge Guido Calabresi of the murkiness of the distinction between limited-purpose or type-2 fora and non-public or type-3 fora, *see* Peck v. Baldwinsville Central School Dist., 426 F.3d 617, 626–27 (2d Cir. 2005). For a lucid but almost inevitably question-begging account of the three, or perhaps four, categories under public forum doctrine, *see* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 334–50 (5th Cir. 2001) (per curiam).

61. *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 46 n.7).

62. *See id.*

63. *See id.*

64. The *Perry* Court specifies that the speech regulation must be reasonable "and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46 (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. at 114,131 n.7). *See also supra* note 58 and accompanying text.

65. *Hazelwood*, 484 U.S. at 270 ("school officials were entitled to regulate the contents of the [newspaper] in any reasonable manner") (citing *Perry*, 460 U.S. at 46).

66. *See id.*

a viewpoint-neutrality requirement when specifically addressing the curricular newspaper as such.[67] The *Hazelwood* Court then dotted the proverbial 'i' by concluding that the newspaper in question had retained its curricular, non-public forum status,[68] and that regulation of speech in that venue was to be tested essentially on the basis of reasonableness.[69]

The Court then, however, began a new and different section of the analysis.[70] The precise point of this separate section is not entirely clear. The point may have been to merely address the reasonableness of the speech regulation under (non)public forum doctrine. Alternatively, the point may have been more broadly to go beyond (non)public forum doctrine, and to distinguish on separate policy grounds the pro-speech rule applied in the classic *Tinker* antiwar armband case.[71]

If the Court is at this point adopting the first alternative and merely applying in context the reasonableness inquiry already discussed,[72] then the Court's focus remains on forum analysis and on characterizing the curricular newspaper as not a public forum.[73] But we will then be left to wonder why the Court then failed to consistently follow its own teaching, before and since, that regulations of speech in even non-public fora must be not only reasonable but, separately, must also be viewpoint neutral, or not based on viewpoint.[74] Perhaps in this context, an intended omission of the usual viewpoint-neutrality requirement for non-public fora can be justified, but if so, only on grounds the Court has not fully articulated in *Hazelwood.*

After all, the Court cannot dismiss a viewpoint-neutrality requirement merely on the grounds of the special characteristic, purposes, and distinctive scope of the newspaper forum in question. The cases requiring viewpoint-neutrality already recognize that non-public fora will have special purposes

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67. *Id.* at 273 ("we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

68. *See id.* at 268, 269.

69. *See id.* at 269.

70. *See id.* Section B of the opinion at 270.

71. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

72. *See Hazelwood*, 484 U.S. at 267, 270.

73. *See id.* at 267–70.

74. *See supra* notes 40 & 47. *See also, e.g.*, Ark. Educ. Television Com'n v. Forbes, 523 U.S. at 666, 682 (1998) ("the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must be otherwise reasonable in light of the purpose of the property"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) ("access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral").

that must be judicially respected.[75] Therefore, something more must be said if the Court is to understandably and persuasively renounce the usual viewpoint-neutrality requirement in this context.

The Court at this point may, however, have instead been seeking more ambitiously to transcend public forum doctrine by addressing the well-known *Tinker* armband war protest case, which does not rely crucially on public forum doctrine.[76] Clearly enough, the *Hazelwood* opinion does explicitly contrast the speech context and circumstances in *Hazelwood* with those in *Tinker*. In particular, the *Hazelwood* Court emphasized the differences in the attributability of the speech in each case to the school, along with the differences in the speeches' effects on the carrying out of the school's legitimate educational missions.[77]

The *Hazelwood* Court first formulated a distinction between speech that the school is required merely to tolerate, and speech that the school is required to affirmatively promote.[78] *Tinker* requires schools to do no more than merely tolerate independent and essentially personal student speech under specified circumstances.[79] The circumstances in *Hazelwood* would require something more from, and would impact differently on, the school.[80]

The speech in *Tinker*, in the form of a black arm band protesting the Vietnam War, could reasonably be ascribed to a student or to the student's family, but not to the school itself. We do not reasonably assume that school authorities know and approve of the political merits of whatever varying messages independent students happen to bear on their clothing on any given day. In an even clearer case, the school's tolerating both pro- and anti-Vietnam War protests on the same day, would not lead a reasonable observer

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75. *See* the cases cited *supra* notes 57, 64 & 74.

76. *See Tinker*, 393 U.S. at 509 (focusing on disruption or distraction and on the rights of the others, in the context of the school's mission and functions, but without public forum analysis and forum categorization in a formal, explicit way).

77. *See Hazelwood*, 484 U.S. at 270–71.

78. *See id.*

79. *See id.* The Court refers to *Tinker*-type speech as speech that merely "happens to occur on the school premises." *Id.* This formula is misleading. It is true that the content of the speech in *Tinker* was not particularly school-related, and could have reasonably been expressed in other venues. But an individual student who wears a black arm band to school to protest the school's censorship policy is clearly engaged in *Tinker* speech. And even the actual speech in *Tinker* took place in school presumably because a school distinctively and conveniently aggregates one's peers. For cases protecting student speech that the court recognizes could not reasonably be perceived as school-sponsored or as endorsed by the school, *see, e.g.*, Frederick v. Morse, 439 F.3d 1114, 1120–21 (9th Cir. 2006); Burch v. Barker, 861 F.2d 1149, 1157 (9th Cir. 1988).

80. *Hazelwood*, 484 U.S. at 271.

to believe that the school officially had authoritatively endorsed both of the opposing political views on the merits.

Student speech that appears in a curricular newspaper may, the Court observed, be perceived differently. The speech in *Hazelwood* was to take place in a school-sponsored forum,[81] a forum that was actively supervised, evaluated, ultimately controlled, and curricular in nature.[82] A school-sponsored or broadly curricular forum may well be such that "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school."[83] In *Hazelwood*, the newspaper was produced as part of the Journalism II elective course under supervision and review by faculty and administration for pedagogical purposes, was largely funded by the Board of Education, and was distributed widely within the school and the broad community.[84]

On this basis, the Court concluded more broadly that

> [e]ducators are entitled to exercise greater control over this [school-sponsored or curricular] form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[85]

These concerns encompass the problem of reasonable perceptions that the school is endorsing, on the merits, the speech in question.[86] But the Court here also recognizes, to some degree, a school's right to convey certain educational lessons in ways that are not blurred or distorted or obscured by the speech of others.[87] And the Court also recognizes a problem of differing judgments over student emotional maturity and emotional preparedness at varied ages for particular materials.[88]

Each of these considerations may, in their place, be sound. But each to one degree or another, and whether justifiably or not, inevitably opens the door

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81. *See id.* at 271 & 271 n.3.
82. *See id.* at 271.
83. *Id.*
84. *See id.* at 262–63.
85. *Id.* at 271.
86. *See supra* text accompanying notes 83–85.
87. *See supra* text accompanying note 85.
88. *See id.* It should be remembered that any student who disagrees with school administrators as to what level of emotional maturity the student's colleagues have reached is welcome to address the students on that more sophisticated and worldly basis, subject not to the *Hazelwood* standard, but to *Tinker*. *See, e.g., supra* note 80.

to sensible viewpoint-based restrictions on speech. We see this more clearly as the Court continues:

> A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized order, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[89]

Inescapably, this logic authorizes speech regulations based on viewpoint, on any reasonable understanding. This is not to minimize the line-drawing difficulties among viewpoint-based, content-based, and content-neutral restrictions.[90] But distinctions among viewpoint-based, content-based, and content-neutral restrictions are central to free speech law as it is currently envisioned.[91] The *Hazelwood* Court's language here certainly seems to legitimize some instances of viewpoint-based restrictions of school-sponsored speech.

Schools seem to be authorized by the Court's language to refuse, if they are thus inclined, to sponsor speech that endorses what is thought to be irresponsible sex, or to even appear to sponsor such speech. Presumably, schools may still sponsor, as well as directly engage in, speech that disapproves of what is thought to be irresponsible sex. Unavoidably, this option to refuse to sponsor certain objectionable or mission-impairing messages clearly opens the door to viewpoint-based restrictions.

It is admittedly technically possible for public schools to refuse to sponsor allegedly irresponsible sexual speech while sponsoring responsible such speech, where the restriction of the first sort is in some sense not based on content or the viewpoint taken by the speech in question. Thus, school sponsorship could be denied to, say, sexually permissive speech, but supposedly not based on any viewpoint attributable to such speech. The

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89. *Hazelwood*, 484 U.S. at 272 (quotations and citations omitted).

90. For a sense of some of the difficulties involved, *see* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006). *See also* Make the Road By Walking, Inc. v. Turner, 378 F.3d 133, 150 (2d Cir. 2004) ("the distinction between content discrimination–permissible in a nonpublic forum–and viewpoint discrimination–impermissible–is somewhat imprecise"); Peck v. Baldwinsville Central School Dist., 426 F.3d 617, 630 (2d Cir. 2005) ("a problematic endeavor").

91. *See* Erwin Chemerinsky, *Content Neutrality As a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000).

argument, under the current case law, would have to be that the restriction on speech was instead justified by reference to what is called the secondary effects of the speech. Secondary effects of speech could include various sorts of ordinary police power harms, not themselves distinctly speech related, and not generally mediated by anyone's agreeing or disagreeing with the content or viewpoint of the regulated speech, that are yet somehow sufficiently associated with the speech in question.

Thus, the Court in *City of Renton v. Playtime Theatres*[92] looked to supposed secondary effects of the sexually-themed cinema, including various sorts of disorderliness and mostly petty crimes and other adverse neighborhood effects, in classifying the zoning regulation that focused on adult theatres as in substance merely a content-neutral speech restriction.[93]

So in some cases, it might be technically possible for a school to target, say, apparently school-sponsored sexually irresponsible speech without doing so on the basis of the disfavored point of view of the speech. But realistically, the proffered justification in such cases is more likely to be viewpoint-based. A justification for a restriction of speech that involves causal mediation of any harm through anyone being relevantly influenced by the point of view underlying the speech will typically amount to a viewpoint-based restriction.[94] For example, refusing to sponsor sexual speech for fear that some students will learn what the school takes to be destructive lessons, apparently with the endorsement of the school, will normally be mediated by the students' adoption of, or direct influence by, the sexual message. In this crucial sense, the speech restriction will be plainly viewpoint-based.

More broadly, a public school's refusal to sponsor speech it deems incompatible with the shared values of a civilized social order[95] will typically be mediated by someone's possible acceptance or rejection of the viewpoint

92. 475 U.S. 41 (1986).

93. *See id.* at 47–49. Whether the Court in Renton actually thought the regulation in question to be content-neutral or merely chose to treat it as such has been the subject of some dispute. *See, e.g.*, City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (the apparent content-neutral classification as "something of a fiction"); *Id.* at 457 (Souter, J., dissenting) (the Renton speech regulation as in a limbo realm of "content-correlation"); Joelner v. Vill. of Washington Park, 378 F.3d 613, 622 (7t h Cir. 2004).

94. Thus there will commonly be a distinction between regulating even detestable speech (merely) because it wakes up sleeping people, and regulating detestable speech out of fear that some persons will accept and believe the detestable speech, leading to various (further) harms.

95. *Hazelwood*, 484 U.S. at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

of the speech in question, and will therefore be viewpoint-based regulation, reflecting approval of or hostility toward one or more points of view.[96]

On this basis, *Hazelwood* in general, clearly allows for a school's control over its own official speech.[97] More interestingly, schools would then also seem to have some latitude in controlling, even with an eye toward viewpoint, speech the school might reasonably be thought to otherwise endorse. The school's range of discretion regarding both its own clearly official institutionalized messages and speech by others that the school merely appears to sponsor is thought to reflect the basic mission and purposes of public schools. These essential public school functions are thought to include pedagogical and broadly educational goals, training and socialization, and broad acculturation.[98]

The Court in *Hazelwood* then brought the broadly analytical, test-formulating, and standard-setting portion of the opinion to a close by again distinguishing *Tinker*-type independent student speech from cases in which the school is asked to in effect "lend its name and resources[99] to student expression.[100] The extent to which non-public forum doctrine was being relied upon, modified, or limited was left unclear.

The Court's summary holding, on whatever theory, makes no explicit reference to any requirement, of any stringency, that the *Hazelwood*-type restriction on speech be viewpoint-neutral. In this, the Court's summary holding parallels the Court's previous omission of any explicit viewpoint-neutrality requirement in holding the curricular newspaper to not constitute a public forum.[101]

Instead, the Court in language we shall next see to have given rise to sharp controversy, confusion, and division in the courts and circuits,[102] adopted what

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96. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50, 67 (1976) (plurality opinion) (concern for whether the regulation was motivated by "hostility for the point of view" of the targeted speakers); Ridley v. Massachusetts Bay Trans. Auth., 390 F.3d 65, 82 (1st Cir. 2004) (viewpoint-based restriction as a matter crucially of authoritative preference among viewpoints); McGuire v. Reilly, 386 F.3d 45, 62 (1st Cir. 2004) ("[t]he essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another").

97. For the government's latitude on even viewpoint-based grounds when speaking in its own official voice and capacity, *see, e.g.*, Rosenberger v. Rector & Bd. of Visitors, 515 U.S. 819, 833 (1995); Wells v. City and County of Denver, 257 F.3d 1132, 1143 (10th Cir. 2001); Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1014 (9th Cir. 2000) ("[a]n arm of local government . . . may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives").

98. *See Hazelwood*, 484 U.S. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

99. *Hazelwood*, 484 U.S. at 272.

100. *Id.* at 272–73.

101. *See supra* notes 61–69 and accompanying text.

102. *See infra* Section III.

appears to be a variant of a minimum scrutiny[103] test: "we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[104] Omission again here of any explicit viewpoint neutrality requirement has become the focal point of controversy.

## III. DOES *HAZELWOOD* PERMIT VIEWPOINT-BASED RESTRICTIONS ON SCHOOL-SPONSORED STUDENT SPEECH?

### A. The Dispute Among the Courts

The *Hazelwood* case itself does not explicitly require that the schools' restrictions of apparently school-sponsored speech be viewpoint-neutral, even though *Hazelwood* seems to rely on cases that do recognize such a requirement.[105] Nor does *Hazelwood*, at least in the context of discussing public forum doctrine, articulate and defend such a loosening of the constitutional tests applied to non-public fora.[106] Whether the Court's later distinguishing of *Tinker*-type genuinely independent student speech carries the argument further is a separate matter.

Thus, the courts have understandably divided on this crucial point in their interpretation of *Hazelwood*. A few courts have taken *Hazelwood* at its word and have allowed for the possibility of viewpoint-based regulation of apparently school-sponsored speech. Notably, the First Circuit[107] and the

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103. For a classic formulation of a similar minimum scrutiny test in the area of constitutional equal protection, *see, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (Colorado state constitutional amendment "lacks a rational relationship to legitimate state interests"); *Id.* at 635 (citing Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988)).

104. *Hazelwood*, 484 U.S. at 273. We may assume that this formula's reference to legitimate "pedagogical" concerns, as opposed to leaving the nature of the school's legitimate concerns unspecified, was not intended to further limit the scope of a school's legitimate concerns beyond those already implied by the Court's discussion. *See supra* notes 69 & 73, together with notes 86 & 90, and accompanying text.

105. *See, e.g., Hazelwood*, 484 U.S. at 270 (citing *Perry*, 460 U.S. at 47); *Hazelwood*, 484 U.S. at 287 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)) ("[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral") (rejecting viewpoint suppression).

106. *See Hazelwood*, 484 U.S. at 270.

107. *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 452–54 (1st Cir. 1993).

Tenth Circuit,[108] with occasional support from scattered additional courts[109] and judges,[110] have taken such a course.[111] Arguably a greater number of courts and commentators,[112] however, have read *Hazelwood* as applying the viewpoint neutrality requirement for nonpublic fora in general, even in the context of apparently school-sponsored speech. This approach, therefore has held such viewpoint-based restrictions subject to rigorous scrutiny. Among

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108. *See, e.g,* Fleming v. Jefferson County Sch. Dist. R-I, 298 F.3d 918, 926–28 (10th Cir. 2002).

109. *See, e.g.,* Chiras v. Miller, No. 3:03–CV–2651–M, 2004 WL 1660388, at *11 (N.D. Tex. Jul. 23, 2004) ("[t]he Supreme Court's reasoning in Hazelwood suggests that the Supreme Court intended that educators have the discretion to make viewpoint–based determinations") *aff'd on other grounds*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) ("[b]ecause we conclude that Hazelwood does not apply in this case, we do not consider whether Hazelwood requires viewpoint neutrality").

110. *See, e.g.,* C.H. v. Oliva, 195 F.3d 167, 172 (3d Cir. 1999) (Stapleton, J., for the court) ("a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible"), vacated and remanded in part and aff'd by equally divided vote, 226 F.3d 198 (3d Cir. 2000) (en banc); C.H. v. Olivia, 226 F.3d 198, 210–11 & 210 n.4 (3d Cir. 2000) (Alito, J., dissenting). *See also* Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1217 (11th Cir. 2004) (per curiam) (Black, J., specially concurring) ("Hazelwood . . . allows for viewpoint-based discrimination against school-sponsored student expression"); *Id.* at 1217–20.

111. This is not to suggest that all judicial approaches to Hazelwood on the question of viewpoint-based regulation fall into a neat binary opposition.

112. *See, e.g.,* Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 668 (2005) ("in cases in which Hazelwood is appropriate, courts should nonetheless ensure that the reasons given by school officials for restrictions on speech are not 'sham' reasons concealing a desire to suppress a political, religious, or racial viewpoint"); Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues For Heightened Protection*, 70 U. CHI. L. REV. 1555, 1556 (2003) ("[i]f a constitutional exception permitting restrictions on student points of view is not compelled by Hazelwood, it is at least arguably consistent with a fair reading of the decision. Nevertheless, such an exception threatens the First Amendment rights of students . . . and is inconsistent with fundamental educational principles. Although it may be appropriate for school officials to prefer a particular viewpoint, and even to advocate it, they should not be permitted to advance that viewpoint simply by suppressing all others"); Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 108 (2002) ("our model would clearly prohibit schools from . . . promoting the value of tolerance, or warning of the dangers of drugs or tobacco except within the confines of a clearly [and narrowly] defined course curriculum, and even then only if such efforts are substantially related to the course's broader perspective, apart from the goals of inculcation"). *But cf.* Janna J. Annest, Note *Only the News That's Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1228 (2002) (judicial deference to local authorities and traditional functions of school administrators).

these courts are the Second Circuit,[113] the Ninth Circuit,[114] the Eleventh Circuit,[115] and the Sixth Circuit in dicta,[116] along with other judges.[117]

The courts are deeply divided on how to crucially interpret *Hazelwood.* Arguably, the preponderance of the case authority lies with requiring[118]

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113. *See, e.g,* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005) (Calabresi, J., for the court) ("we conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests") (emphasis in the original). *See also id.* at 632 ("we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally sub silentio, overrule Cornelius and Perry –even in the limited context of school-sponsored student speech").

114. *See, e.g.,* Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (en banc); Downs v. Los Angeles Unified School Dist., 228 F.3d 1003, 1010–11 (9th Cir. 2000) (noting the Planned Parenthood result, *supra,* in dicta). *See also,* at the trial court level within the Ninth Circuit, Seidman v. Paradise Valley Unified Sch. Dist., 327 F. Supp. 2d 1098, 1108–09 (D. Ariz. 2004) (school-sponsored speech, or speech bearing school imprimatur, but not speech by school itself, as subject to viewpoint-neutrality analysis).

115. *See, e.g.,* Searcey v. Harris, 888 F.2d 1314, 1319 n.7, 1325 (11th Cir. 1989). *See also* Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1215 (11th Cir. 2004) ("Hazelwood does not allow a school to censor school-sponsored speech based on viewpoint"); *Id.* ("[a]lthough Hazelwood provides reasons for allowing a school official to discriminate based on *content,* we do not believe it offers any justification for allowing educators to discriminate based on viewpoint") (quoting *Searcey,* 888 F.2d at 1325 (emphasis in the original)). *But see id.* at 1217, 1217 (Black, J., concurring specially) (Hazelwood as permitting "viewpoint-based discrimination against school-sponsored student expression").

116. *See* Kincaid v. Gibson, 236 F.3d 342, 355 (6th Cir. 2001) (dicta) ("[e]ven were we to assume . . . that the yearbook was a nonpublic forum, confiscation of the yearbook would still violate . . . free speech . . . . Although the government may act to preserve a nonpublic forum for its intended purposes, its regulation of speech must nonetheless be reasonable, and it must not attempt to suppress expression based on the speaker's viewpoint"). See also within the Sixth Circuit at the trial court level, Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799, 806 (E.D. Mich. 2004) (requiring viewpoint neutrality under Hazelwood in reliance on Kincaid, *supra*); Hansen v. Ann Arbor Pub. Schools, 293 F. Supp. 2d 780, 793, 797 (E.D. Mich. 2003) (same). For commentary on Dean, *see* Rodney A. Smolla, Smolla & Nimmer On Freedom of Speech 17:10.50 (Vol. 2) (Apr. 2005).

117. Significantly, then judge and now Supreme Court Justice Samuel Alito has argued in the context of religiously expressive speech in a public school class assignment that "even in a 'closed' forum governmental 'viewpoint discrimination' must satisfy strict scrutiny." C.H. v. Oliva, 226 F.3d 198, 203, 210 (3d Cir. 2000) (en banc) (Alito & Mansmann, JJ., dissenting). The en banc opinion in *Oliva* vacated and remanded in part a panel opinion reported at 195 F.3d 167 (3d Cir. 1999), in which the panel had concluded that "a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible." *Oliva,* 195 F.3d at 172. The en banc vacating opinion itself, apart from the Alito dissent, did not reach and discuss the issue of the permissibility of viewpoint-based restrictions under Hazelwood. *See Oliva,* 226 F.3d at 203. At least vaguely relevant for dicta would be the school subsidy of speech case of Bd. of Regents v. Southworth, 529 U.S. 217 (2000).

118. While courts occasionally refer literally to a constitutional prohibition of viewpoint-based restrictions, they presumably mean only that such restrictions are strongly disfavored and are subject to strict scrutiny. *See, e.g., Peck,* 426 F.3d at 633, n.11; *Oliva,* 226 F.3d at 210, n.4 (Alito, J., dissenting) (citing authorities on per se unconstitutionality of viewpoint-based restrictions versus a prima facie unconstitutionality tested by strict scrutiny). *Cf.* Burson v. Freeman, 504 U.S. 191, 212 (1992)

viewpoint neutrality in regulating school-sponsored speech. But we should be able to do better than just mechanically total up the number of cases and announce a result. We should also be able to do better than offering merely a narrow attempt to interpret *Hazelwoods* failure to discuss a possible viewpoint-neutrality requirement[119] against a background of its references to cases imposing just such a requirement.[120]

### B. The Basic Meaning of Allowing or Disallowing Viewpoint-Based Regulations Under *Hazelwood*

How, then, should the courts resolve what is left debatable in *Hazelwood*? On the merits, should viewpoint-based restrictions on school-sponsored student speech be prohibited or more precisely, subjected to some version of strict scrutiny? Strict scrutiny, after all, is not an utterly unaccommodating standard. Strict in theory need not mean fatal in fact.[121] Under a strict scrutiny test, restrictions on school-sponsored speech could survive if shown to be narrowly tailored to serve a compelling governmental interest.[122]

Literally, a test that combines the express language in *Hazelwood* with a viewpoint-neutrality requirement would not in itself look like a strict scrutiny test. The test would draw from the familiar tests for non-public fora in general,[123] but would have three explicit parts. A school's restriction of apparently school-sponsored speech would thus have to promote a legitimate pedagogical concern,[124] the restriction on student speech would have to be

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(Kennedy, J., concurring).

This interpretation does mean, however, that the government interest underlying such restrictions must be of the same weight as that required in cases of subject matter-based restrictions in other types of fora. The required degree of tailoring between the government interest and the scope of the speech restriction varies according to forum. *See, e.g.*, the sources cited *supra* note 44. But viewpoint-based restrictions in school-sponsored speech cases, as in non-public fora generally, and even subject matter based restrictions on speech in other fora, would require a showing of a compelling government interest. *See, e.g.*, the sources cited *supra* note 44.

119. *See, e.g.*, the discussion in *Peck*, 426 F.3d at 632–33. The Court in Hazelwood also does not explicitly characterize the principal's justifications for deleting the two stories in question as content-neutral.

120. *See supra* note 105 and accompanying text.

121. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), as later validated in Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *Id.* at 326–27 ("[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it").

122. For the standard strict scrutiny test, *see, e.g.*, *Perry*, 460 U.S. at 45.

123. *See, e.g,* the sources cited *supra* note 105.

124. *See Hazelwood*, 484 U.S. at 273.

reasonably related to that concern, and the restriction would have to be viewpoint-neutral as well.[125]

This understanding of a *Hazelwood* test would be, in two respects, looser than a standard strict scrutiny test. A merely legitimate, as opposed to genuinely compelling, interest would be required. That the interest would have to be pedagogical,[126] rather than encompassing just any governmental interest, does not seem especially restrictive, given the breadth of a school's possible interests discussed in *Hazelwood*.[127] Moreover, the test would literally and directly apply only a reasonable relationship test[128] to the degree of fit between regulatory ends and means, as opposed to the more demanding narrow tailoring required under conventional strict scrutiny.[129]

The test above would also impose a third element of viewpoint neutrality. Admittedly, it seems unlikely that this would be read as an absolute prohibition of any viewpoint-based regulation of school-sponsored speech in all circumstances.[130] If a school were to impose such a viewpoint-based restriction, presumably most courts would be willing to consider the weight of the school's interest and the degree of tailoring involved, and apply some awkwardly superimposed form of strict scrutiny. If the school's interest in applying a viewpoint-based regulation were deemed not just legitimate but sufficiently compelling, and the degree of tailoring sufficiently precise, such a regulation could in a presumably rare case survive;[131] or so we may assume for present purposes. The question is instead whether upholding viewpoint-based regulations of school-sponsored speech at most in only rare instances is the most defensible judicial course.

### C. *Hazelwood*, Viewpoint-Based Regulation, and Public Forum Doctrine

We may reformulate the above question in a number of ways. One such way is to ask whether a version of strict scrutiny should be applied to

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125. This is presumably the thrust of the cases cited *supra* notes 113-17 and accompanying text.

126. *See Hazelwood*, 484 U.S. at 273.

127. *See id.* at 271–72 (quoting *Fraser*, 478 U.S. at 683) (discussing interests ranging from discouraging poor grammar or drug and alcohol use to inculcating "the shared values of a civilized social order")

128. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995) (random urinalysis tests for public school athletes under the search and seizure clause) (citing *Hazelwood* as requiring only reasonableness of relationship).

129. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 45 (1983); Riley v. Nat'l. Fed. of the Blind, 487 U.S. 781, 800–01 (1988) (strict scrutiny and narrow tailoring in particular required of regulation of charitable funding solicitation).

130. *See, e.g.*, the sources cited *supra* note 118.

131. *See id.*

viewpoint-based regulations of school-sponsored speech in nonpublic fora. This formulation reminds us of the role of public forum doctrine, and more specifically of the law's general hostility toward viewpoint-based regulations even in nonpublic fora.[132]

Thinking of *Hazelwood*-type school-sponsored speech cases as problems within public forum doctrine is in some ways confining, but in other ways illuminating. *Hazelwood*-type cases, whether involving viewpoint-based restrictions or not, involve an arguably very special and distinct kind of nonpublic forum. If we treat *Hazelwood* cases as merely a typical species of nonpublic forum case, we are thereby led to focus unhelpfully on the broad rules that govern nonpublic fora and other types of fora generally, whatever the significant differences in more specific institutional context and purposes. This awkward focus on forum classification is of especially great practical importance in light of the frequent and severe difficulties courts have in classifying a particular forum as a type-3 nonpublic forum or as instead a type-2 designated or limited purpose public forum.[133] Disputes within a multi-member court over how a given forum should be classified are common.[134] In fact, such disputes are nearly guaranteed by the inexactitude,[135] if not

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132. *See, e.g, Perry*, 460 U.S. at 46; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985).

133. *See, e.g.*, the thinness of the distinctions drawn in Ark. Educ. Television Sys. v. Forbes, 523 U.S. 666, 679 (1998) ("a designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers"). *See also id.* (distinguishing "property generally available to a certain class of speakers" from property where access is reserved "to a particular class of speakers, whose members must then, as individuals, 'obtain permission'") (citing *Cornelius*, 473 U.S. at 804).

One way of seeing the problem with this distinction is that selective access for a particular class of individual speakers could in a given case mean that any of an enormous number and broad variety of speakers need merely show a student identification card to be admitted to the non-public forum. Non-public or type-3 fora can thus be broadly inclusive and nearly non-selective. Designated or type-2 fora, however, can in contrast be starkly limited to a narrow and distinctive "certain" class of the few speakers interested, say, in the narrow subject of the upcoming re-election campaign of a powerful local politician. The first forum would be nearly wide open, but classified as a nonpublic or type-3 forum; the second forum's constricted focus and membership would still leave it a designated or type-2 forum.

The creators of fora rarely think systematically of the various bounds and limits of forum access, and access policies commonly evolve only ad hoc. Reasonable disputes over whether a forum is a type-2 designated forum or else a type-3 non-public forum are thus inevitable. Even in *Forbes* itself, the majority held the televised debate to be a non-public forum. *Id.* at 678. The three dissenters, however, observed with equal logic that if the forum owner invited, as a class, the class of viable or newsworthy electoral candidates, the government had on the majority's own definition clearly created a designated public forum. *See id.* at 683, 693 n.18 (Stevens, J., dissenting).

134. *See supra* note 133; *Peck*, 426 F.3d at 626–27 (2d Cir. 2005); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 344–50 (5th Cir. 2001) (per curiam).

135. *See supra* notes 133–34.

manipulability, of how the respective fora can often be characterized, limited, and defined.[136]

With these murky distinctions among types of fora and different resulting constitutional tests, it is important to think carefully about any given forum classification. However, given the uncertain definitional boundaries among the kinds of fora, it is especially helpful to consider the consequences of schools' and courts' inevitable misclassifying school-sponsored speech among the various kinds of fora.

If mistakes in forum classification are indeed common, we should take the likely effects of those erroneous classifications into proper account. To begin with, we should recognize that in some cases, a court may classify a viewpoint-based restriction of school-sponsored speech as taking place not within a type-3 nonpublic forum, but within a type-2 designated or limited purpose public forum.[137] A viewpoint-based restriction in a *Hazelwood* non-public forum might not face strict scrutiny, depending upon whether we ultimately decide that a viewpoint-neutrality requirement in *Hazelwood* cases is appropriate. Yet if we mistakenly think the speech is taking place in a type-2 designated or limited purpose public forum, the viewpoint-based speech restriction will uncontroversially be subject to strict scrutiny and quite likely struck down, as would a restriction that is more generally content-based.[138]

In such a mistaken forum classification, there is actually a chance that the speech regulation will not face strict scrutiny. This is largely not a matter of principle, but rather, of a further murky and manipulable distinction. In a type-2 designated or limited purpose public forum, what might otherwise be thought of as a fatally viewpoint-based restriction on speech may be sanitized and excused if the "viewpoint" can instead be described as part of the unstated definition, scope, and limits of the forum.[139] What would otherwise amount

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136. *See id.*

137. Our emphasis at this point is not on confusion between viewpoint-based and any other sorts of restrictions on speech, but on confusions between types of fora, as introduced *supra* notes 133–34.

138. *See, e.g.*, Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 46 (1983) (as long as a government chooses to hold open a designated or limited purpose public forum, "it is bound by the same standards as apply in a traditional public forum. Reasonable [content-neutral] time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest") (quoting Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).

139. *See, e.g.*, Goulart v. Meadows, 345 F.3d 239, 252–54 (4th Cir. 2003); Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 842 n.5 (6th Cir. 2000) (strict scrutiny for regulation of speakers assumed to fall within the scope of the forum, but not for those assumed to fall outside the intended scope and limits of the designated forum) (citing Warren v. Fairfax County, 196 F.3d 186, 193–94 (4th Cir. 1999) (en banc)).

The key to excluding a speaker from a designated or limited-purpose forum is an obviously vague inquiry into whether the excluded party is of a relevantly "similar character" with those included. *See*

to a viewpoint can legitimately be built into the very scope or theme of a given type-2 forum. Contrary speech in such a case could then be held to be relevantly dissimilar, thus outside the defined scope and limits of the forum, and therefore properly excludable as foreign to the forum.[140] In such a case, the court may or may not still reach the right result. But any fortuitously right result in such a case would still reflect misclassification and arbitrariness.

Particularly, then, in an area of such murkiness and even manipulability, where misclassifications are common, there is much to be said for a simpler, two part rule of reasonableness as explicitly[141] specified in *Hazelwood*, rather than the more complex three part rule that results if we read a superimposed viewpoint-neutrality requirement into *Hazelwood*.[142]

We should, of course, seek to reduce not only the sheer number of legal errors, but also the severity of the errors that legal rules create. How serious will the errors of misclassification be if we adopt the simpler two-part test formulation for *Hazelwood*-type cases and omit any third requirement of viewpoint-neutrality? Among the realistic such scenarios would be those involving a regulation that would properly pass the relaxed *Hazelwood* standard, but that is misclassified as bearing upon speech in a more protected designated or limited purpose public forum. Let us assume that the misclassified regulation is in fact reasonably regulated to a legitimate pedagogical concern.

If the regulation is then judicially misclassified as applying to a type-2 designated or limited-purpose public forum, and the speech regulation is held to be either viewpoint-based or even more generally content-based, it will likely be struck down.[143] The regulation could have been upheld in the context of any non-public forum, and not merely in the context of a *Hazelwood* non-public forum, if it were held to be content- but not viewpoint-based.[144]

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ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005); *Warren, supra*, 196 F.3d at 194 (quoting *Perry*, 460 U.S. at 48). Deciding who counts as sufficiently similar to current speakers, especially when the scope and limits of the designated forum have never been fully specified, is at best speculative. At worst such a process becomes an entry point for arbitrariness, if not viewpoint bias. Relatedly, "a facially neutral restriction may operate as a facade for excluding speakers expressing certain viewpoints while allowing those expressing other viewpoints to enter." *Make the Road By Walking*, 378 F.3d 133, 151 (2d Cir. 2004).

140. *See, e.g., Warren*, 196 F.3d at 194; *Perry*, 460 U.S. at 48.

141. *See supra* notes 106–10 and accompanying text.

142. *See supra* notes 111–16 and accompanying text.

143. *See supra* note 139 and accompanying text.

144. *See supra* notes 106–10 and accompanying text. *But cf. Make the Road By Walking*, 378 F.3d at 150 (due to overlap, "the distinction between content discrimination—permissible in a nonpublic forum—and viewpoint discrimination—impermissible—is somewhat imprecise") (citing *Rosenberger*, 515 U.S. at 831).

The crucial problem, though, is that striking down a reasonable regulation of speech is not necessarily a good thing. A generally sensible speech regulations being struck down unnecessarily, especially in our *Hazelwood* cases, is not necessarily a victory for the public good or even freedom of speech. Such a misclassification and judicial rejection of the speech regulation may well be unnecessarily costly in terms of constitutional, educational, and other public values.[145]

D. At the Vague Boundaries of Public Forum Doctrine: Regulating School-Sponsored Speech in Non-Public Fora and the School's Speaking For Itself

The costs in educational or other public values of the above sort of misclassification may or may not in any given case be modest. But let us briefly consider as well another vague boundary problem. The law seeks to distinguish between speech by some party that is apparently or actually approved by the school from speech by the school itself, made officially on behalf of the school by an authorized agent of the school.[146] At its simplest, then, the law seeks to distinguish between nonpublic forum speech that the school merely somehow approves or sponsors, and official speech on behalf of the school itself by its agents. The distinction between speech in a nonpublic forum that the school somehow sponsors and speech by or officially in the name of the school is inevitably vague, if it is tenable at all. We should

145. *See infra* Section IV and the educational and civic values at stake in *Hazelwood* nonpublic forum cases as briefly discussed in *Hazelwood*, 484 U.S. at 272.

146. For a sense of the wide latitude accorded to governments speaking officially in their own right, *see, e.g.*, Rosenberger v. Rector & Bd. of Visitors, 515 U.S. 819, 833–34 (1995); Specifically, a government may not only discuss "gay and lesbian awareness and tolerance in general, but also . . . advocate such tolerance if it so decides, and restrict the contrary speech of one of its own representatives by refusing to incorporate that speech into its own presentation." Wells v. City and County of Denver, 257 F.3d 1132, 1143 (10th Cir. 2001) (quoting Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1014 (9th Cir. 2000)); Edwards v. Cal. Univ., 156 F.3d 488, 492 (3d Cir. 1998) ("[a] holding that the University may not discriminate based on viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles") (quoting *Rosenberger*, 515 U.S. at 833–34); *Peck*, 426 F.3d at 625 n.5 ("[w]hen the government itself is the sole speaker, it need not ensure viewpoint diversity and can simply express its own viewpoint") (quoting *Make the Road By Walking*, 378 F.3d at 151).
Further, a government as speaker is entitled to "take legitimate and appropriate steps to ensure that its message[s] [are] neither garbled nor distorted." Griffin v. Dept. of Veterans Affairs, 274 F.3d 818, 822 (4th Cir. 2001) (quoting *Rosenberger*, 515 U.S. at 833–34). *See also* Chiras v. Miller, 432 F.3d 606, 615 (5th Cir. 2005) ("[b]ecause the Board must necessarily exercise its editorial discretion in selecting which private entities will convey the message the state selects, forum analysis and viewpoint neutrality are inapposite in this case").

therefore be reluctant to try to impose radically different free speech tests on such only hazily distinguishable categories.

In this context, we begin with the well-settled premise that a public school, along with other government entities, has great latitude in speaking through its agents for itself. A school is not subject to anything like a broad prima facie requirement of viewpoint-neutrality in its speech on its own behalf. We rightly expect schools speaking in their own name to privilege certain views and values.[147]

It is possible to grant that there is some reason to avoid radically different free speech tests for difficult-to-distinguish speech contexts, but to still maintain that speech and its restriction by a school in its own right, along with merely school-sponsored speech in a nonpublic forum, should both be subject to a strict viewpoint-neutrality requirement.

But that rule would realistically be a non-starter. Requiring a school to virtually never choose among messages based on point of view, even when the school is speaking in its own voice, is at best widely unattractive on the merits.[148] If a school wishes, for example, to say in its own name that harmony is better than divisiveness, or that equality is better than caste, it should be allowed to do so without having to pass strict scrutiny, and without having to invent sufficient viewpoint-neutral grounds for saying so. If one or more students prefer to endorse disharmony in their own name, that speech is instead governed by other rules.[149]

Requiring a school to treat all viewpoints equally in its own official speech, as tested by strict scrutiny, would also be unmanageable as a practical matter, even if we could reliably distinguish such speech from merely school-sponsored speech. Deciding judicially whether a school's official speech reflected a viewpoint-bias, or was instead based on grounds other than viewpoint and approval or disapproval of the ideas involved, would typically be difficult.[150]

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147. See the authorities cited *supra* note 146.

148. A democratically elected government that affords itself literally no privileged opportunities in articulating the values on which it was elected is likely to thereby undermine its own leadership, and seems unlikely to long prevail in any competition among parties or governments.

149. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

150. See, e.g., Make the Rd. By Walking Inc. v. Turner, 378 F.3d at 150 (noting the imprecision of the viewpoint-based versus other content-based or subject matter-based distinction). *See also* PMG Inter. Div. v. Rumsfeld, 303 F.3d 1163, 1171 (9th Cir. 2002) (quoting *Rosenberger*, 515 U.S. at 831). It seems clear that one means of attempting to favor or disfavor particular viewpoints can be to prohibit raising an entire subject from any point of view.

In fact, asking a public school to educate, but at the same time to not discriminate in its own official speech on the basis of viewpoint, is actually deeply incoherent. It is to ask the impossible. To educate in a pluralist democratic society inevitably requires that the school speak substantively in its own voice, through policies, rules, curricular choices, assemblies, textbooks, library holdings, publications, websites, and in other contexts. Many considerations may affect such choices. But such choices must to a degree prefer one view over another and not merely as a matter of effect, but of intent as well. Nor would a policy of official silence on all issues amount to genuine viewpoint neutrality, even if official silence on, say, competitively selected textbooks were logically possible.

This is not to suggest that there is no practical difference between, for instance, a school's endorsing one candidate for mayor and officially endorsing none. Both decisions are in a sense not neutral; but, their effects on public perceptions of the school may dramatically differ. There can sometimes be meaningful value in a teacher's careful disclaimer that she is in a given instance speaking only personally in a classroom discussion, and not on behalf of the school.[151] A school can also welcome individual or group student dissent in one or more ways.[152]

It is clear that attempting to judicially require viewpoint neutrality in a school's own official speech, or in the restriction by higher authority of the school's own other recognized official agents, is not a viable option. If, in view of the likely confusion, official school speech and merely school-sponsored speech are to have similar free speech tests, the best option is to allow for speech regulation on the basis of viewpoint in both contexts, rather than in neither context.

### E. Distinguishing School-Sponsored Speech and the Independent Speech of Students

An interesting response to this argument takes the problem of category overlap in a different direction. There may well be serious overlap between official school speech and merely school sponsored speech. Yet, might not

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151. *But cf.* Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (classroom teaching at public university prefaced by references to personal religious bias). The effectiveness of such a disclaimer may always be open to question, but is at least more likely to be understood by students of greater age and sophistication.

152. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (discussing the use of mandatory student activity fees in a supposedly viewpoint-neutral manner to subsidize and promote a range of conflicting viewpoints expressed by private organizations).

there be as much confusion[153] between apparently school sponsored speech and the speech of individual students or groups of students speaking entirely in their own right, on their own behalf? These latter instances of purely independent student speech we may generally refer to as *Tinker*-type cases.[154] Should there be some similar test for both *Hazelwood* and *Tinker*-type cases in light of this possible confusion? Should that common test then allow, in substance, for viewpoint-based regulation in appropriate cases, even in *Tinker*-type cases?

There are two things to say at this point in response. First, there is some reason to conclude that even if the confusion between school-sponsored speech and independent student speech is as common as between school-sponsored and official school speech, the practical problems created by such overlap may be less in the former case. Both school-sponsored speech and official school speech will typically involve speech in the name of the school, or a claim to speak in the name of the school. Anything like a disclaimer, a disavowal, or a disassociation of school affiliation in that context will often be nearly impossible or only partly effective. It may often be difficult to clarify in the public mind the status of the speech as between official school speech and merely school-sponsored or school-endorsed speech.

Second, if the confusion is between school-sponsored speech and independent student speech, it will often be possible for either or both parties to at one point or another substantially limit if not eliminate any reasonable public confusion. Either party, if it cares to, will often be able to credibly disavow, or else positively associate itself with, the speech. There may be rare cases, though, in which disavowal is somehow impossible, or is not available in time, or is too costly.

Often, though, the school may credibly, clearly, and conspicuously disavow the speech in question, at least in terms of its sponsorship, without reaching the merits of any agreement-worthiness of the speech. Such a disavowal itself should typically resolve any reasonable confusion. In such a case, the school often need not single-out, let alone disagree with, the speech in question. Instead, the school's disclaimer of sponsorship can extend to all

153. Such cases could, for example, take the form of a dispute over whether a medium such as a newspaper, yearbook, website, or bulletin board comprises school-sponsored speech or independent student speech. *See, e.g.*, Hosty v. Carter, 412 F.3d 731, 735–36 (7th Cir. 2005) (yearbook); Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208 (11th Cir. 2004) (mural painted as part of school construction project); Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001) (yearbook as a "limited public forum").

154. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

instances of a broad category of speech.[155] Such a disavowal may not always be neutral in its intent or effect and may even intentionally aim critically at perceived bias or prejudice;[156] but it should ordinarily establish the lack of school sponsorship of the speech.

Let us suppose, however, that there is still a reason, based in overlap and confusion, to apply similar speech tests in the cases of school-sponsored and independent student speech. To put it another way, that the *Hazelwood* test and the *Tinker* test should for some reason be roughly compatible, at least with regard to permitting or generally rejecting viewpoint-based regulation of speech. Should we not understand *Tinker*, at least, as largely ruling out viewpoint-based regulation of independent student speech?

It is doubtless tempting to read *Tinker* as a broad charter for independent student free speech, at least where the speech is not vulgar or profane.[157] *Tinker* does not talk explicitly of permitting viewpoint-based speech restrictions in appropriate cases. It is certainly possible to express the gist of *Tinker* in viewpoint-neutral terms, at least in some formalistic sense.

As *Tinker* is commonly interpreted, though, the logic of *Tinker* is open in appropriate instances to what amount in substance to viewpoint-based speech restrictions, or to restrictions that take someone's agreement or disagreement with the message itself into account. *Tinker* clearly allows for restrictions on speech to protect largely unspecified rights of largely unspecified persons apart from the speaker.[158] As we recognize or decline to recognize various sorts of rights jeopardized by *Tinker* speech, inevitably we thereby advance and impair the expression of particular associated independent student points of view. Recognition or non-recognition of new rights will realistically be inseparable

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155. The Court in *Hazelwood* writes that

> a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself' . . . not only from speech that would 'substantially interfere with its work . . . or impinge upon the rights of other students,' . . . but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (citations omitted). Note, in particular the Court's endorsement here of the school's disassociating itself from speech that is thought by the school to reflect bias or prejudice, a determination that is hardly possible without a viewpoint evaluation. The disassociation by the school is thus in such a case made on viewpoint-based grounds. *See id.*

156. *See id.*

157. *See id.*, and in terms of the direct sanction of student speech, *see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986). Thus according to *Hazelwood*, "[a] school need not tolerate student speech that is inconsistent with its basic educational mission." 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

158. *See Tinker*, 393 U.S. at 509, 513.

from consequences on what then may or may not be said and specifically in the viewpoints involved. *Tinker* thus has ample potential for judicially reflecting what would in practice amount to preference among viewpoints. As well, *Tinker* allows for restrictions protecting and furthering the undisputed and unimpaired educational work and mission of the school itself.[159] The educational mission of the public school is to some degree infused with viewpoint preferences about cultural values and is arguably adversely affected by the expression of certain student messages and viewpoints, and not by others.

These limitations on independent student speech do not refer directly to a school's explicitly privileging any student-expressed point of view in any context. There will certainly be occasions in which a school, in restricting independent student speech under *Tinker*, is acting directly for the sake of avoiding substantial interference with its work or for avoiding some rights violation. The school, however, may well be crucially motivated by its sympathy or lack of sympathy for viewpoints of the would-be speakers and their audience.

The independent student speaker's viewpoint, perhaps in some cases one of hostility toward other groups of students, may in turn be resented or rejected by other students.[160] The restriction on such speech, however it might be formally justified, is clearly framed, motivated, and mediated by the cognitive and emotional reactions of some persons to the perceived merits of the views expressed by others. The essential educational work and mission of the school is, as well, ultimately based on official preferences among viewpoints. Civility, respect, equality, and tolerance, along with the undoubted values of free speech and dissent, can be legitimate, and indeed, crucial elements of that public school mission. These are affirmed values not only at the level of general civic and public educational expectations, but at the level of free speech doctrine as well.[161]

Thus, the role of these crucial values need not be confined to the school's official speech, or even to the combination of official and school-sponsored speech. The legitimate unimpaired teaching of values such as basic civic

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159. *See id. See also Hazelwood*, 484 U.S. at 266; *Fraser*, 478 U.S. at 682, 685; Brandt v. Bd. of Educ., 420 F. Supp. 2d 921, 930 (N.D. Ill. 2006) ("a school need not tolerate student speech that is inconsistent with the school basic educational mission").

160. *See, e.g.*, Confederate flag in public school cases such as Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003); Castorina v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001); Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000); West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10t h Cir. 2000).

161. *See Fraser*, 478 U.S. at 683–85; *Hazelwood*, 484 U.S. at 271–72.

equality may extend at least to restricting the expression by independent students of extreme group-based contempt or the direct, personalized advocacy in school of extreme group subordination. Such speech could easily be held to impair the basic mission and civic functioning of the school. *Tinker* itself, in recognizing the public school's broad legitimate pedagogical mandate, authorizes no less.

In such cases, a school's inability to appropriately regulate such independent speech might itself send to many reasonable students and to outsiders an important unattractive message that the school should be entitled to not send. If it is still insisted that all such speech regulation is in a sense still viewpoint-neutral, the question then reduces to mostly one of mere terminology. But without substantial disagreements on the merits concerning the messages or views sent and received, the point of any regulation of the student speech in these cases largely disappears.

### F. Distinguishing Between Viewpoint-Based and Viewpoint-Neutral Restrictions As a General Problem

A similar problem and a similar logic in another context also suggest tolerating reasonable viewpoint-based regulation in *Hazelwood*-type cases. The distinction, in general, between a viewpoint-based restriction and a viewpoint-neutral restriction may in the abstract seem clear, but it is often hazy and contestable.[162] We have already seen that a viewpoint-based restriction in a type-2 designated or limited-purpose forum can often be characterized as instead merely clarifying, by exclusion, the defining scope and purposes of the forum itself.[163] More generally, viewpoint-based restrictions can be taken for subject matter-based or other content-based restrictions, and vice versa.[164]

In particular, though, we should also consider the costs in basic educational and other public values of misclassifying a school-sponsored speech restriction as viewpoint-based when the restriction is actually merely based on subject-matter, or on other viewpoint-neutral grounds. Such cases would involve regulation of school-sponsored speech based on some entirely reasonable viewpoint-neutral grounds, where the regulation might well be able to "pay for itself" under an appropriate viewpoint-neutral free speech test, but where the regulation is misclassified and mistakenly struck down under a

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162. *See supra* note 148 and accompanying text.

163. *See supra* note 127 and accompanying text.

164. *See, e.g, Make the Rd. By Walking, Inc.*, 378 F.3d at 151 ("a facially neutral restriction may operate as a facade for excluding speakers expressing a certain viewpoint").

demanding strict scrutiny test for viewpoint based-speech restrictions. This outcome involves an unnecessary and unjustified loss of educational or other civic value.

Admittedly, it is also possible for a regulation of school-sponsored speech that is actually based on viewpoint to be misclassified as based on grounds other than viewpoint, and thus improperly upheld. But the costs in public values of this opposite kind of mistake may well tend to be relatively low. As we shall see below,[165] in the context of speech that is school-sponsored, reasonable and legitimate regulation of speech based on the school's desire to promote some views and ideas in preference to others will often be justifiable.

There may be instances as well in which viewpoint-based regulations of school-sponsored speech actually promote no appropriate educational or civic values. Punishing the editors of a school newspaper precisely for say, failure to denigrate some ethnic group, would presumably fall into this category. Let us assume that the courts then have difficulty with the problem of pretext in such a case, and that they thus misclassify the regulation as viewpoint-neutral. Again, little harm is done by this misclassification, as our own suggestion is to indeed allow for the possibility of a viewpoint-based regulation in some cases, but only as long as the viewpoint-based regulation promotes a genuinely legitimate pedagogical concern in a reasonably tailored way,[166] allowing as well for other appropriate causes of action by challenging parties.

This is certainly not to downplay the interests of those persons stigmatized by a school's invidious regulation of fair-minded school-sponsored speech. The responses of those stigmatized persons will presumably be protected by the *Tinker* free speech standard for individual or groups of students whose speech is not school-sponsored. More importantly, the victims of invidious speech regulation by a public school retain a range of possible remedies if the school's regulation of fair-minded, school-sponsored speech is based on viewpoint. These will include potential civil rights-oriented remedies.

A school's regulation of such speech, therefore, must always at a minimum promote a legitimate purpose of a public educational system in a reasonably tailored way. And an invidious viewpoint-based regulation must still face the gauntlet of potentially relevant independent statutory judicial tests apart from free speech, including federal and state civil rights laws,[167] which may also bear upon the legitimacy or tailoring of the school's regulation.

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165. *See infra* Section IV.

166. *See Hazelwood*, 484 U.S. at 273.

167. *See, e.g.*, the discussion of potential federal civil rights violations and a school's resulting anti-harassment policy in Saxe v. State Coll. Area Dist., 240 F.3d 200 (3d Cir. 2000) (finding the particular speech code overbroad in an opinion by then-judge Samuel Alito).

There are also possible challenges under federal and state equal protection provisions;[168] free exercise of religion[169] or Establishment Clause claims;[170] as well as claims based on state constitutional rights to equality in public education.[171] Any remaining risks of viewpoint-based regulatory harms must be balanced against the substantial gains in fully allowing schools to distinctively promote values such as equality, civility, and tolerance in school-sponsored speech without having always to pass a rigorous strict scrutiny test. Nor should schools be deterred from reasonably promoting such values based on a school's fear that it may not be able in a given case to prove a genuinely compelling interest and precise narrow tailoring.

The possibility of a speech regulation's being misclassified either as viewpoint-based, or instead as viewpoint-neutral, is real. Courts actually differ among themselves as to whether even the regulation in *Hazelwood* itself was,[172] or was not,[173] based crucially on the subject matter or topic of the speech at issue.[174] More broadly, courts have inevitably been reduced in a wide variety of contexts to doing their best, with an eye toward the various costs of litigation, with the murky viewpoint-based—viewpoint-neutral distinction.

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168. *See, e.g.*, Seidman v. Paradise Valley Unified Sch. Dist., 327 F. Supp. 2d 1098 (D. Ariz. 2004) (decided in part on equal protection as well as free exercise grounds) (student sought to have religious reference inscribed on individual wall tile within school); Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003) (school assembly and program speech case decided in part on equal protection, free exercise, and Establishment Clause grounds).

169. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (denying summary judgment on free speech and free exercise of religion claims in alleged compelled speech case involving acting classes); C.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999) (free exercise and Establishment Clause claims raised in case of teacher's refusal to allow student to present religious material in class), *aff'd in part and vacated and remanded in part*, 226 F.3d 198 (3d Cir. 2000) (en banc); Demmon v. Loudoun County Pub. Sch., 279 F. Supp. 2d 689 (E.D. Va. 2003) (religiously inscribed brick on public school walkway) (held to state a claim under free speech and under Establishment Clause but not under Free Exercise Clause).

170. *See, e.g.*, Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003); Demmon v. Loudoun County Pub. Sch., 279 F. Supp. 2d 689 (E.D. Va. 2003).

171. For a broad survey of the area, *see* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013 (2003).

172. *See* Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989) (Hazelwood as involving a content-based regulation focused on subject matter and not on viewpoint).

173. *See Hansen*, 293 F. Supp. 2d at 798–99 (the school principal in Hazelwood as not opposed merely to particular topics) ("[a]lthough Hazelwood itself does not specifically mention viewpoint neutrality, it is implicit in the Court's holding").

174. Note also the curious disagreement in Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995) ("[t]he censorship in . . . Hazelwood . . . involved a school newspaper, a kind of open forum for students") *with id.* at 158 n.1 (Batchelder, Jr., concurring) ("I am puzzled by the majority's characterization of the school newspaper in Hazelwood as 'a kind of open forum for students").

Thus, for example, a policy of including military recruiters but excluding peace activists on a school's career day was understandably held to be viewpoint-based.[175] In contrast, refusing to allow Planned Parenthood to purchase advertising space in school-sponsored media was held to be viewpoint-neutral.[176] Disallowing a home-schooler's use of public library meeting rooms for teaching basic curricular subjects was also deemed viewpoint-neutral.[177] Excluding members of a welfare rights organization from the waiting rooms of welfare department offices was also held viewpoint-neutral.[178]

The distinction between viewpoint-based and viewpoint-neutral criteria is murky in part because restrictions fraught with antagonism, fear, or resentment can often be plausibly explained or at least rationalized on viewpoint-neutral grounds.[179] Yet, it is the very possibility of speech restriction based partly on such antagonism, fear, or resentment that would, according to common sense, trigger serious and demanding judicial review of the speech restriction in question.

## IV. THE PUBLIC INTEREST IN LEGITIMATE VIEWPOINT-BASED REGULATIONS OF SCHOOL-SPONSORED SPEECH

All of the arguments raised above, based mainly on one sort or another of likely category confusion, deserve full consideration and appropriate weight. But we should ask as well a much more direct question. We should at least speculate within limits about some general consequences of possible alternative free speech rules, including our own suggested rule.

Suppose then that a constitutional rule allowed public schools to privilege certain viewpoints, and to dis-privilege other viewpoints, in school-sponsored speech. Suppose further that such privileging and dis-privileging were tested only on some grounds less rigorous than strict scrutiny. Thus, in such school-sponsored speech cases, the courts could uphold viewpoint-based speech regulations without the school's persuasively showing in every instance some

175. *See Searcey*, 888 F.2d at 1324–25.

176. *See* Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 829–30 (9th Cir. 1991) (while at the same time being motivated at least in part by anticipated parental objections on the merits of the speech).

177. *See* Goulart v. Meadows, 345 F.3d 239, 257–58 (4th Cir. 2003).

178. *See* Make the Road By Walking, Inc. v. Turner, 378 F.3d 133, 151 (2d Cir. 2004).

179. *See supra* notes 176–178 and accompanying text.

genuinely compelling pedagogical or other government interest.[180] Or, perhaps, without the school's having to show that such a regulation is actually necessary and narrowly tailored to achieve whatever pedagogical interest is sought.[181]

It is admittedly difficult to resist the temptation to assume that in general viewpoint-based restrictions are the worst sort speech restrictions and must be severely constitutionally tested.[182] This may well be sensible in the abstract. However, it is much less appropriate in the specific context of school-sponsored speech, for reasons we can now briefly further consider.

In the context of school-sponsored speech, we should consider the likely costs and benefits of more and less rigorous tests for viewpoint-based restrictions, including the Court's own literal reasonableness test in *Hazelwood*.[183] As best we can determine, would strict scrutiny, if not actual prohibition,[184] of viewpoint discrimination in regulating school-sponsored speech be optimal? Would it tend on balance to advance, or to inhibit, the pursuit of our most basic social and constitutional values under our actual contemporary cultural conditions?

The primary problem with applying strict scrutiny in this context is that restriction of speech on the basis of viewpoint is a genuine part of, and not merely difficult to separate from, the legitimate central mission of the public schools. A public school or school system must widely uphold what it takes to be valuable and worthy speech at the direct and explicit expense of less valuable and less worthy speech that arguably reflects upon the school.[185] A school is properly expected to refuse to endorse, or at least to hold the right to refuse to endorse, what it takes to be irresponsible speech even as to

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180. For merely a few of many instances of standard strict scrutiny formulas in one or more free speech contexts, see, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) in the context of content-based regulation of speech in traditional public fora); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)).

181. *See, e.g.*, the cases cited *supra* note 180.

182. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) ("we have implicitly distinguished between restrictions on expression based on *subject-matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious") (quoted in Turner Broadcasting Sys. Inc. v. FCC, 512 U.S. 622, 685 (1994) (Ginsburg, J., concurring in part and dissenting in part)).

183. 484 U.S. at 273 ("reasonably related to legitimate pedagogical concerns").

184. *See supra* note 116 and accompanying text.

185. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988).

viewpoint.[186] The public schools in particular are expected to serve broadly as "a principal instrument in awakening the child to cultural values."[187]

This understanding of the purpose of public schools is not merely a matter of Supreme Court endorsement.[188] It is also central to historical conceptions of the functions of public schools. Consider in particular the widely-respected twentieth century progressive educational theorist John Dewey. Dewey of course recognized a variety of roles and functions of the public schools.[189] Among these functions, according to Dewey, is a message or information filtering process that can be neither invariably viewpoint-neutral nor confined entirely to official school speech, as distinct from merely school-sponsored speech.[190]

Dewey thus declares unabashedly, in his leading statement of progressive educational principles, that "it is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes."[191] 'Unworthiness' can hardly be confined to a neutrally selected group of mere subjects; viewpoint, and in particular a negative evaluative viewpoint, inevitably enters crucially into such judgments.

By way of elaboration, Dewey then argues that in the schools:

> Selection aims not only at simplifying but at weeding out what is undesirable. Every society gets encumbered with what is trivial, with dead wood from the past, and with what is positively perverse. The school has the duty of omitting such things from the environment which it supplies and thereby doing what it can to counteract their influence in the ordinary social environment.[192]

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186. *See id.* at 272.

187. *Id.* (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

188. *See id.*; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

189. *See, e.g.*, JOHN DEWEY, DEMOCRACY AND EDUCATION 19–20 (Dover ed. 2004) (1916). For a further elaboration of some of the presumed purposes of primary education, *see* THOMAS JEFFERSON'S 1818 REPORT FOR THE UNIVERSITY OF VIRGINIA, REPRINTED IN THOMAS JEFFERSON, WRITINGS 459–60 (Merrill D. Peterson, ed.) (Library of America. 1984) (including, *inter alia*, "to improve, by reading, [the student's] morals and faculties; to understand his duties to his neighbors and country").

190. *See supra* note 146 and accompanying text.

191. DEWEY, *supra* note 189, at 20. The relationship between Dewey's progressive pedagogy and restraints upon merely personal, unsponsored student speech as in *Tinker* is interesting, but beyond the scope of our current inquiry. For similar sentiments by arguably the leading Enlightenment theorist, *see* IMMANUEL KANT, EDUCATION sec. 18, at 20 (A. Churton trans.) (Univ. of Michigan Press 1960) (1803) ("moral training must form a part of education. It is not enough that a man shall be fitted for any end, but his disposition must be so trained that he shall choose none but good ends—good ends being those which are necessarily approved by everyone, and which at the same time be the aim of everyone").

192. DEWEY, *supra* note 189, at 20.

Sensibly, Dewey's express focus here is on the "environment"[193] that the school supplies. This 'environment' presumably starts with the school's own official speech in its own name,[194] but extends at least to school-sponsored speech, and perhaps even to some unassigned school library materials.[195] A public school on such a theory has at least a right, if not a duty,[196] to not lend its legitimizing authority to speech touting what the school deems unworthy[197] or even perverse,[198] whether the school then tolerates analogous merely personal student speech under *Tinker*[199] or not.

This legitimate Deweyan[200] agenda would not properly carry much weight for our purposes if public schools most typically applied viewpoint regulation of school-sponsored speech for invidious purposes, or for purposes at odds with public education in a democracy that aspires to protect the rights and interests of all. So we might wish to make a rough "background" judgment, then, as to whether in the typical run of cases, viewpoint-based restrictions on school-sponsored speech will tend more to undermine than to promote the public interest, seen as reasonably reflecting the rights and interests of all.

The messages that contemporary public schools will want to sponsor doubtless vary in their viewpoint. But at least a cursory examination of the thinking of leading general institutional actors within public school management and operation is in this respect generally reassuring. The sense arises that the most typical viewpoint-based restrictions in our contexts need not provoke conscientious alarm. They certainly need not be unnecessarily

193. *Id.*

194. *See, e.g.*, the curricular textbook selection cases of Chiras v. Miller, 432 F.3d 606, 615 (5th Cir. 2005); Asociacion de Educ. Privada v. Garcia Padilla, 408 F. Supp. 2d 62 (D. P.R. 2005).

195. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982). In this case, the Court divided badly. A plurality opinion by Justice Brennan suggested that removing unassigned books from the school library could not be justified by a narrow, politically partisan intent to deny access to disfavored ideas, but could be justified if the school's intent was to deny access to materials deemed pervasively vulgar or otherwise "educationally unsuitable." *See id.* at 871. One problem with this distinction is that too many realistic cases, as of Hitler's Mein Kampf, are characterizable as both politically objectionable at the level of ideas and educationally unsuitable as well.

196. *See* DEWEY, *supra* note 189, at 20.

197. *See id.*

198. *See id.*

199. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

200. *See, e.g.*, for developments in other contexts, Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671 (1990); Margaret Jane Radin, *A Deweyan Perspective On the Economic Theory of Democracy*, 11 CONST. COMMENT. 539 (1995); RICHARD RORTY, OBJECTIVITY, RELATIVISM, TRUTH 211 (2001) (discussing Dewey).

impaired by being subjected to strict scrutiny[201] as opposed to a reasonableness and legitimacy standard.[202]

Consider, for example, the widely publicized stances on some crucial issues consistently taken by some of the major general institutional players in the public schools. We focus here on 'crucial' issues for their inherent weight as evidence, but communities also benefit when schools properly regulate for the sake of some less than truly compelling interests, with or without precisely narrow tailoring. Let us start at the federal elective level. At the electoral-sensitive level of the Federal Secretary of Education, the Secretary has commendably and very publicly "reacted to reports of harassment of Muslim and Arab American students by calling on teachers to discuss diversity with their students."[203] In this effort, the Secretary was seconded by the National Education Association, which devised a set of lesson plans in response.[204]

On broader issues of diversity, the National Education Association has taken a consistent series of important complementary stands. These include forthright stances on affirmative action,[205] on culturally responsive teaching,[206] and on inclusiveness in the public schools.[207] More broadly, the National Education Association has itself noted that another significant institutional actor, the American Association of Colleges and Universities has several

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201. *See supra* note 180 and accompanying text.

202. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("reasonably related to legitimate pedagogical concerns"). For an apparently contrary case, *see* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (en banc). This case involved an individual teacher's desire to enter a controversial play into a statewide competition despite some eventual local political opposition. Our expectations would be that veteran public school teachers should be somewhat less likely than random students to want to deliver anti-social messages under school auspices. Boring was actually decided under the Pickering/Connick general public employee speech test, which tends to work poorly in academic freedom contexts. It is possible, depending on one's understanding of the claims at issue, that plaintiff Boring could actually have lost her claim under a viewpoint-neutral test focusing on curricular authority, but her case is in any event strongly sympathetic. *See also* the Pickering/Connick test applied in the somewhat similar teacher speech case of Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001).

203. Stop Bullying Now!, Education World, *available at* http://www.nea.org/lessons/2004/tt040913.html (website of the National Education Association) (last visited Jan. 24, 2007).

204. *See id.*

205. *See* Statement of NEA President Reg Weaver in Support of Promoting Diversity in Schools, *available at* http://www.nea.org/newsreleases/2003/nr030331.html (supporting affirmative action) (last visited Jan. 24, 2007).

206. Culturally Responsive Teaching, *available at* http://www.nea.org/teachexperience/divk040811.html ("[i]n a world of increasing cultural diversity, teachers need strategies for adapting their teaching to meet the needs of all students") (last visited Jan. 24, 2007).

207. Presidents Viewpoint: Are You Ready?, *available at* http://www.nea.org/neatoday/0005/presview.html ("we . . . take enormous pride in the diversity of our public schools . . . our schools refuse to exclude; we insist on including every child, from the most gifted to the most challenging") (last visited Jan. 24, 2007).

"studies . . . showing how diversity can work to benefit student attitudes and academic development."[208]

As well, the National Association of Secondary School Principals (hereinafter "NASSP") has expressed similar sentiments. The NASSP Statement of Values holds that "[t]he great variety of faces that regularly appear in our classrooms and hallways brings with it a similarly great variety of educational aspirations and needs to which our schools and our society must respond with care, resources, and professional skills."[209] The NASSP Statement continues more specifically to the effect that "[s]chools must unabashedly teach students about key virtues such as honesty, dependability, trust, responsibility, tolerance, respect, and other commonly held values important to our society."[210]

Of course, inculcating values such as tolerance and respect[211] will often be conducted through the school's own speech, in the sense of the speech of its own official agents speaking in that very capacity.[212] But the legitimate mission of promoting and privileging a range of values will inevitably extend to speech that at least appears to bear the stamp of approval of the school itself, and is thus school-sponsored speech within the meaning of *Hazelwood.*

Similar sentiments have been expressed by other notable institutional entities directly involved with the public educational process. Thus, for example, the American Association of University Professors officially endorsed affirmative action in 1973,[213] and in particular reaffirmed its commitment to the inclusion of women and minorities in university staffing in 1983.[214] The American Federation of Teachers has long taken public stands promotive of civil rights within schools[215] and in the broader society as well.[216]

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208. Creating the Interactive Diverse Classroom, *available at* http://www2.nea.org/he/advo00/advo0002/feature.html (last visited Jan. 24, 2007). A follow-up search for the term 'diversity' at the Association of American Colleges and Universities website yielded a total of 3,199 records containing the term (search for 'diversity' at http://www.aacu-edu.org/search/searchresults.cfm) (last visited Jan. 24, 2007).

209. NASSP Statement of Values, Preamble, *available at* http://www.principals.org/s_nassp/ (last visited Jan. 24, 2007).

210. *Id.* (student development section).

211. *See id.*

212. *See supra* note 146 and accompanying text.

213. *See* Affirmative Action Plans, *available at* http://www.aaup.org/AAUP/pubsres/policydocs/AAplans.htm (last visited Jan. 24, 2007).

214. *See id.*

215. *See* AFT--Civil Rights, *available at* http://www.aft.org/topics/civil-rights/index.htm (last visited Jan. 24, 2007).

216. *See id.*

Regulation of much school-sponsored speech is of a sort that may distinguish among viewpoints, promoting some viewpoints and being critical of others. It may be that in a few cases, the viewpoint-based regulation of such speech could predictably pass strict scrutiny. Such speech regulation would have to reach the demanding level of being genuinely necessary for and narrowly tailored to the promotion of a genuinely compelling government interest.[217] There are, however, doubtless many instances of legitimate and socially useful such speech regulation where the government interest may arguably not rise to the level of the genuinely compelling, at least in the eyes of a particular judge, or even more likely where the government cannot show the tailoring of the speech regulation to be sufficiently precise to pass the demanding test of narrow tailoring under strict scrutiny.

The prospect of a strict scrutiny test being imposed on a viewpoint-based speech regulation may well deter mostly quite sensible regulation of school-sponsored speech. Particularly under such a rigorous test, where the precise narrowness of tailoring is inevitably subject to judicial second-guessing, there is likely to be a "chilling effect"[218] not on clearly independent student speech, but on the school's ability to fully carry out its "basic educational mission."[219] Student speech that is clearly independent will still be governed under *Tinker*,[220] rather than *Hazelwood*. Yet, unnecessarily strict scrutiny of sensible regulation of arguably school-sponsored speech may well discourage typically useful speech regulation largely because of the increased risks of litigation under general civil rights statutes. Such statutes prominently include section

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217. *See supra* note 180 and possible examples cited *supra* note 202.

218. For a brief discussion and application of the idea of a "chilling effect" or improper disincentive on legitimate speech, *see* Multimedia Holdings Corp. v. Circuit Court of Florida, 544 U.S. 1301 (2005). For an example of a loosely analogous disincentive, *see* Ruth A. Kennedy, *Insulating Sexual Harassment Grievance Procedures From the Chilling Effect of Defamation Litigation*, 69 WASH. L. REV. 235 (1994). For the sheer manipulability of judicial inquiries into the presence or absence of sufficient narrow tailoring, *see, e.g.*, R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 183–87, 195–98 (1997).

219. Discussed in the context of regulating student speech in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986). *See also, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.16 (5th Cir. 2004) (quoting *Hazelwood* 484 U.S. at 266); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001) (quoting *Hazelwood*, 484 U.S. at 266).

220. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

1983 actions,[221] with the prospect of reasonable attorney fees for a prevailing plaintiff.[222]

To the extent that strict scrutiny in general inhibits sensible viewpoint-based regulation of at least apparently school-sponsored speech, the school's own legitimate free speech interests also suffer. Every conscientious speaker presumably wishes to convey a clear, consistent, undistorted, ungarbled message. Strict scrutiny for sensible viewpoint-based regulation of school-sponsored, as opposed to independent, speech impairs the school's ability to convey worthwhile and benign messages without unnecessary confusion, and thus impairs the school's own significant free speech interests, typically to the prejudice of the community as a whole.

## V. CONCLUSION

We need take no issue with the broad general rule that viewpoint-based restrictions of speech are especially suspect.[223] But in our public school-sponsored speech regulation contexts, the balance of interests actually tilts against a strict scrutiny test, and in favor of a less demanding and more literal application of the actual language of *Hazelwood*.[224] For the reasons elaborated above,[225] the direct and indirect costs of strict scrutiny and a viewpoint-neutrality requirement in school-sponsored speech regulation contexts are likely to be significant. A lower level of judicial scrutiny is, in contrast, likely to involve more limited social costs, and to bring significant benefits to the public educational process and to the broader public.

There will doubtless be cases in which unregulated school-sponsored speech by students or teachers itself really promotes basic progressive values unequivocally better than would the speech regulations the particular public school authorities would prefer. But given the general sympathies of many of the major institutional actors, such cases would seem to be relatively rare

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221. Suits in these contexts under 42 U.S.C. § 1983 against cities, school boards, and individual defendants acting under color of state law in violating free speech rights are common, as are actions under Title IX and under state constitutional provisions. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 345 (6th Cir. 2001) (section 1983 action); Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1211 n.2 (11th Cir. 2004) (various claims including under section 1983); Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (granting qualified immunity defense of defendants sued in their individual capacity).

222. *See, e.g.*, the discussion of section 1988 attorney fee availability in Texas State Teachers Ass'n v. Garland Ind. Sch. Dist., 489 U.S. 782, 788 (1989).

223. *See supra* notes 1, 182 and accompanying text.

224. *See supra* note 183 and accompanying text.

225. *See supra* sections III and IV.

occurrences. Students or teachers would in any event retain their free speech rights under *Tinker* when speaking independently.

In our contexts, a lower level of judicial scrutiny, as we have seen in Section IV, better promotes social, educational, and cultural values, and even basic constitutional values including overall freedom of speech itself. To the extent that the major institutional educational actors and most public schools generally wish to send messages of tolerance, civility, inclusion, equality, and responsibility, such messages are blurred, if not entirely garbled, when persons who at least appear to speak in the school's name contradict those messages. The school's own freedom of speech is thus impaired by a strict scrutiny test that unnecessarily hinders the school's efforts to ensure the clarity of its own voice and the voices of its actual or apparent spokespersons. Independent speakers who are publicly understood to be independent of the school can retain their own speech rights under cases such as *Tinker*.[226] But the school's own speech is hardly free where a demanding strict scrutiny test, requiring viewpoint neutrality, discourages the school from presenting a clear and consistent stand on significant educational and cultural matters.

Every pattern of legal analysis, though, eventually reaches the limits of its proper application. What are the limits of the *Hazelwood* analysis? Should the constitutional tests of regulations of school-sponsored speech in grade schools also set the standard for advanced graduate programs of major public research universities?[227] It is difficult to believe that the same test should apply in both of these contexts, unless what is in some sense the "same" test is by its nature in application actually fully responsive to the major relevant differences between public elementary grade schools and research university graduate seminars.

Whether we should apply any version of *Hazelwood*, or some other test,[228] in various university campus contexts is, under the current law, murky, disputed, and unresolved.[229] Even if a public university were to see itself as

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226. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

227. For discussion of arguably appropriate free speech rule differences based on the age or educational attainment of the students, and the current judicial disarray on such issues, *see, e.g.,* Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) ( Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) applicable to appropriate cases of collegiate speech); Student Government Ass'n v. Bd. of Trustees, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (*Hazelwood* as not applicable to college newspaper).

228. *See* cases cited *supra* note 227.

229. *See, e.g.,* Chiras v. Miller, 432 F.3d 606, 617 n.29 (5th Cir. 2005) (survey of the federal appellate circuits, finding that *Hazelwood* has been applied to instructional speech in some circuits, whereas other circuits have applied what is referred to as the Pickering-Connick test instead). *Compare, e.g.,* Vanderhurst v. Colo. Mountain College Dist., 208 F.3d 908, 913–14 (10th Cir. 2000) (applying *Hazelwood*) *with* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368–69 (4th Cir. 1998)

officially embracing some unusually distinct and substantively defined mission, we would still want to give appropriate scope to the public interest in free speech by the school's specialized academic experts in various contexts.[230]

In any event, with respect to genuine *Hazelwood*-type problems, any unclear responsibility in cases of actual or apparent school-sponsored speech can normally be effectively reduced in the context of, say, a controversial graduate seminar. Whether it is even possible, in the context of a fourth grade class, for school-sponsorship to be meaningfully and fully disclaimed seems doubtful. However, where this kind of disclaimer or disassociation can, as at the university level, often be effective at the deepest level of understanding, there remains little or no *Hazelwood*-type problem of blurred responsibility for apparent school-sponsored speech.

In the graduate seminar context, the professor, or the school administration, if not both, may be willing to disavow or disassociate from sponsoring or being sponsored in[231] the controversial speech in question. These disassociations may well be clear, public, conspicuous, unequivocal, understandable, and entirely convincing to those affected. The school may be able to point in addition to its employment of other faculty who publicly disagree with the speaker on the viewpoint at issue.

Typically, university undergraduate and graduate students and others in a position to meaningfully evaluate a controversial class or seminar, or lecture presentation on the merits, will also be able to appreciate any public disassociation of school and speaker that has taken place. More fundamentally, the more sophisticated audience will likely presume that research university faculty members, whether in the sciences and technology or in social sciences, humanities, or professional schools, do not simply articulate the preexisting and preordained beliefs of the university trustees and administration. The professor's controversial views can readily enough be established as the professor's own, and not necessarily those of the school. Such university cases, however they are best decided, simply do not fit the paradigm of *Hazelwood*-type school-sponsored speech.

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(en banc) (applying the broader two-part Pickering-Connick threshold-balancing test). The possible applicability in teacher classroom speech cases of the Supreme Court's modification of the *Pickering-Connick* test in Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) has yet to be established. *See also* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J. L. & EDUC. 1 (2001).

230. *See, e.g.*, AAUP 1940 Statement on Academic Freedom and Tenure, *available at* http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm (last visited Jan. 24, 2007).

231. *See id. See also* Laura K. Schulz, *Note, A "Disacknowledgement" of Post-Secondary Student Free Speech: Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS U. L.J. 1185 (2003).

This observation by itself certainly does not exhaust the differences between elementary school and research university contexts. The free speech rights of public university research faculty clearly deserve separate consideration. As merely a start, we may fairly assume that the more clearly a university faculty member can establish that she speaks on some occasions for herself or for some group and not necessarily for the university trustees and administration, the less the justification for the university to impose viewpoint-based restrictions on such clearly independent speech. At that point, the value of viewpoint-based speech restrictions under *Hazelwood* largely runs out.